

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

|                 |   |                      |
|-----------------|---|----------------------|
| JOHN L. LOTTER, | ) |                      |
|                 | ) |                      |
| Petitioner,     | ) | 4:04CV3187           |
|                 | ) |                      |
| v.              | ) |                      |
|                 | ) |                      |
| ROBERT HOUSTON, | ) | MEMORANDUM AND ORDER |
|                 | ) |                      |
| Respondent.     | ) |                      |
| _____           | ) |                      |

A telephone conference call was held with counsel on February 26, 2008. Counsel reported to the court on various matters, as discussed below.

First, the petitioner's "retardation claim" has been dismissed by the state district court. Since that claim was the basis of this court's stay order issued April 29, 2005 (filing 34), counsel felt obliged to report its status. As of the time of the telephone conference, the appeal time had not run. Since then, however, counsel have reported to the court that the petitioner did not appeal the state district court's ruling.

Second, petitioner's co-defendant, Marvin Thomas Nissen, has recently signed an affidavit recanting his trial testimony against the petitioner. Petitioner filed a motion in the trial court for a new trial based on the recantation, but that motion was denied by the assigned state district judge in October or November, 2007. No appeal was taken from the denial of the motion.

Third, petitioner has now requested that his counsel in this case represent him in presenting a claim to the state courts based on the recantation in another postconviction proceeding. Counsel inquired whether this court could or would appoint them

to represent petitioner in the state postconviction proceeding or whether this court would object to their doing so.

Fourth, counsel inquired whether the stay of this case should be continued pending the outcome of this anticipated postconviction action in the state courts.

The court and counsel discussed these matters at some length. I concluded that despite misgivings about the proposed representation and how it might affect this case, this court has no jurisdiction to appoint or not appoint the petitioner's counsel to represent him in a state postconviction proceeding. Nor could I prohibit them from seeking such an appointment by the state district court.

Regarding the continuation of the stay of this case, respondent's counsel had no objection to continuing the stay in this case pending the completion of the anticipated state postconviction action. The court agreed that continuing the stay in this case at this time may actually hasten the ultimate resolution of this case.

In accordance with the discussion during the conference,

IT THEREFORE HEREBY IS ORDERED,

The stay order previously entered by this court continues in effect. Counsel shall inform the undersigned within thirty days following the entry of a final order in the state proceedings.

DATED this 19<sup>th</sup> day of March, 2008.

BY THE COURT:

s/ *David L. Piester*

David L. Piester  
United States Magistrate Judge